JustMediation PLC
Dale Ann Iverson, J.D. Principal

October 31, 2002

Clerk
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

Subject: Comments regarding Proposed Amendments of MCR 2.401 (F) and (G) and MCR 2.410(D)(2) and (3)

Members of the Supreme Court:

Thank you for the opportunity to respond to the proposed amendments. This Court has acted thoughtfully and effectively over the past four years to lay a sound foundation for mediation in our courts. I am writing because I am concerned that the proposed requirement for "good faith" participation by parties in mediation will undermine that foundation. This letter addresses only that portion of the proposed amendments.

So that you will understand my perspective, I have practiced as a trial lawyer with Smith Haughey Rice & Roegge in Grand Rapids for the past 19 years. I began training and working as a mediator in 1995, and this summer left SHRR to open a practice strictly devoted to dispute resolution, with an emphasis on mediation. I served on this Court's Dispute Resolution Task Force, and I am the immediate past chair of the ADR Section of the State Bar and immediate past president of the Grand Rapids Bar Association. I am an approved mediator in the VFM Program in the United States District Court, Western District, and in numerous circuit courts around the state. The opinions expressed here are my own.

You have already received insightful comment from colleagues around the state, and I heartily concur with the sentiments raised there. I am reluctant to belabor those points but will observe, for a moment. The reality of our world is that many individuals, families, and corporate entities find themselves in conflict with others they do not trust. Meeting with those people face-to-face is stressful and frustrating. Negotiating an end to the conflict can be a long and painful process.

In the mediation session, folks are called to listen to another side of the story, and to hear proposals that often feel offensive and demeaning. It is frequently the case that, under these circumstances, each side in the dispute is tempted to conclude that the other is acting in "bad faith". In fact, that conclusion probably feels very "natural" at the time. One job for the mediator is to refrain from drawing that conclusion, except under the most unusual circumstances, and to remain effective at all times in helping each side listen and acknowledge that there may be more than one side to a conflict.

It is not the case usually that universal understanding and trust is reached among the parties, although it can happen... What does happen is that, through the process, disputants become more able to focus on their future, prepare themselves to move on from this dispute, and trust the other side enough to

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develop a resolution and effectuate a settlement. Frequently, this may take more than one mediation session, or a lot of follow-up work by the mediator on the telephone after the initial session. What may have looked like bad faith at the initial session looks like a fair settlement days, weeks, or months later as the parties do some hard negotiating with the mediator's assistance.

Negotiating is hard work and emotionally draining, for individuals and corporate parties. While using mediation to negotiate a resolution has lots of advantages, it doesn't eliminate all the tension and anxiety as parties and counsel work to get the best result they can. At times, their positions may seem extreme to outsiders or to their opponents. In a court-connected mediation program like Michigan's, in which referral to mediation can and will be mandatory in many instances, it is particularly important that we allow the parties to negotiate without any more compulsion than is already present in the situation. The mediator and the parties are in the best position to make a decision about whether a mediation session is productive and are free to end the session if they determine to their satisfaction that the process has become unfair in some way.

Of course, the courts must provide important safeguards for the mediation process, and their role should not be discounted. Failure of a party to attend and breach of the confidentiality agreement are two examples where the courts' involvement promotes the mediation process consistent with the principles of self-determination of the parties and the mediator's code of conduct. For those parties and counsel who would like to involve a wider audience more deeply in the negotiation and their underlying belief that the other side is not worthy of compromise, the mediation process is probably strengthened by limiting the circumstances under which they can make this argument outside the mediation. The proposed amendments will encourage them to resort to a higher authority, and may compromise the mediator, the process, and the negotiation.

My colleague Larry Connor wrote an article in the State Bar Journal when the new ADR court rules were first adopted. He offered that the goal of the Task Force had been to create a court-connected ADR program that got the horse to water, but didn't make her drink. For mediation to be widely accepted and used by trial lawyers and their clients, we need to be careful to create an environment that coaxes meaningful participation and provides limited but important safeguards, but leaves the negotiation to the parties, their counsel, and the mediator.

Thank you for your consideration of these views, and for your commitment to the growth of sound court-connected mediation programs around the state.

Sincerely,

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